87-613

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

HONORABLE GEORGE BRODY, JUDGE,
UNITED STATES BANKRUPTCY COURT, PETITIONER

v.

HELEN JEAN GUERCIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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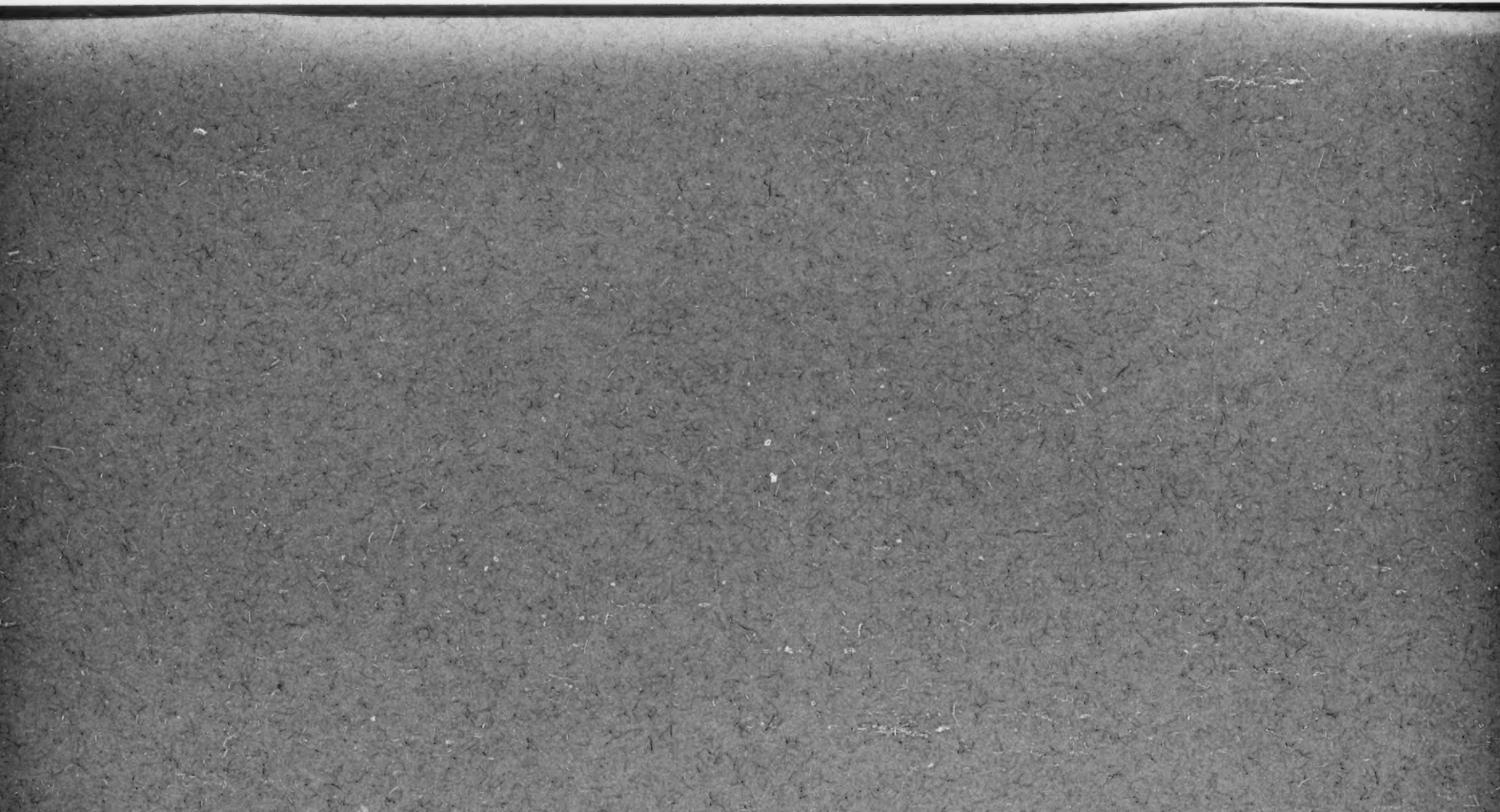

QUESTION PRESENTED

Whether a judge is absolutely immune from damages in an action concerning the allegedly unconstitutional dismissal of his confidential secretary.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution:

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Honorable George Brody, United States Bankruptcy Court Judge for the Eastern District of Michigan, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying Judge Brody's petition for rehearing and suggestion for rehearing en banc (App., *infra*, 19a) is reported at 823 F.2d 166.[1] The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 814 F.2d 1115. The opinion and order of the district court (App., *infra*, 13a-18a, 22a) are unreported.

[1] The Honorable John Feikens, Chief Judge of the United States District Court for the Eastern District of Michigan, is a co-defendant in this suit. The court of appeals granted Judge Feikens' petition for rehearing and suggestion for rehearing en banc (App., *infra*, 20a-21a; 823 F.2d 166). In doing so, it stayed its mandate only with respect to Judge Feikens (App., *infra*, 20a). Thus, the action against Judge Brody has effectively been severed from the action against Judge Feikens—at least with respect to the absolute immunity defense.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1987. A petition for rehearing was denied on July 17, 1987 (App., *infra*, 19a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 1979, petitioner, the Honorable George Brody, United States Bankruptcy Court Judge for the Eastern District of Michigan, hired respondent, Helen Guercio, to serve as his personal and confidential secretary (App., *infra*, 2a). Approximately nine months later, in October 1979, respondent became involved in an effort to expose corruption in the Bankruptcy Court. Among other things, she disclosed that the Bankruptcy Court's system of random case assignments was being manipulated. As a result of these disclosures, a bankruptcy judge resigned and the government prosecuted and convicted an attorney and a bankruptcy court clerk. *Ibid.*

In May 1981, the Judicial Council of the Court of Appeals for the Sixth Circuit placed the Bankruptcy Court in receivership and instructed the United States District Court for the Eastern District of Michigan to undertake general oversight of the Bankruptcy Court's operations (App., *infra*, 3a). That court, in turn, directed then-Chief Judge John Feikens to assume supervisory responsibility for the Bankruptcy Court (*ibid.*).

Following these actions, respondent circulated to the press and others certain previously published articles concerning a lawyer who had recently been nominated to fill a vacancy on the Bankruptcy Court (App., *infra*, 3a). The articles said that the lawyer had been nominated in 1969 for the position of United States Attorney and that the nomination had been withdrawn when it was disclosed that he had represented reputed organized crime figures (*ibid.*).

In October 1981, with the approval of Chief Judge Feikens, Judge Brody fired respondent (App., *infra*, 3a).

2. Respondent then filed this action against Judge Brody and Chief Judge Feikens, alleging that her termination violated the First Amendment (App., *infra*, 2a).[2] According to respondent, Judge Brody and Judge Feikens discharged her in retaliation for her disclosures concerning both the corruption in the Bankruptcy Court and the background of the nominee to that court. She requested compensatory and punitive damages, as well as reinstatement. *Ibid.*

Judge Brody and Chief Judge Feikens moved for dismissal of the complaint or, in the alternative, for summary judgment, asserting that they had absolute and qualified immunity from respondent's action and, in any event, that respondent had failed to state a claim upon which relief could be granted (App., *infra*, 15a-16a). The district court, relying on this Court's decision in *Stump* v. *Sparkman*, 435 U.S. 349 (1978), held that both judges were entitled to absolute immunity and thus granted the motion to dismiss (App., *infra*, 16a). While it "recognize[d] that the actions of Judge Feikens and Judge Brody were not actions that were taken in the courtroom under the normal advocacy proceedings," it nevertheless determined "that the actions of the Judges, whether correct or not, were done within their capacity as Judge of the United States District Court and Judge of the United States Bankruptcy Court for this district" and, accordingly, "that the doctrine of absolute immunity is applicable here" (*id.* at 17a).

3. The court of appeals reversed and remanded (App., *infra*, 1a-12a). It stated that "[t]he central issue in this case is whether Judges Brody and Feikens were carrying out a

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[2] The respondent also claimed violations of her Fourth and Fifth Amendment rights. These latter claims, however, were abandoned on appeal.

judicial act in firing [respondent]" (*id.* at 3a). It further stated that, in *Stump* v. *Sparkman,* 435 U.S. 349 (1978), this Court "set forth a two-pronged test for determining whether an act by a judge is a 'judicial' one. The first element relates to the 'nature of the act itself, *i.e.*, whether it is a function normally performed by a judge.' * * * The second element concerns the 'expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity' " (App., *infra,* 3a-4a (quoting *Stump* v. *Sparkman,* 435 U.S. at 362)). After noting that other courts have held that "decisions by judges in the personnel context are not judicial acts" (App., *infra,* 7a),[2] it then concluded that "a proper application of the *Stump* test requires that the firing of [respondent] be deemed a non-judicial act" (*id.* at 9a). It reasoned that "[t]he firing of a confidential and personal secretary is hardly the 'type of act normally performed only by judges' " (*ibid.* (quoting *Stump* v. *Sparkman,* 435 U.S. at 362)), that "the expectations of the parties in this case are that personnel/administrative matters are involved, not judicial acts" (App., *infra,* 9a), and that "extending immunity to Judges Brody and Feikens * * * would not serve a central underlying purpose of judicial immunity: promoting fearless and independent decisionmaking by the judiciary" (*ibid.*).

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[2] The court cited (App., *infra,* 7a) the following cases for the proposition that decisions by judges in the personnel context are not judicial acts. *McMillan* v. *Svetanoff,* 793 F.2d 149 (7th Cir. 1986), cert. denied, No. 86-384 (Dec. 1, 1986); *Goodwin* v. *Circuit Court,* 729 F.2d 541 (8th Cir.), cert. denied, 469 U.S. 828 (1984); *Richardson* v. *Koshiba,* 693 F.2d 911 (9th Cir. 1982); *Lewis* v. *Blackburn,* 555 F. Supp. 713 (W.D.N.C. 1983), rev'd on other grounds, 759 F.2d 1171 (4th Cir.), cert. denied, 474 U.S. 902 (1985); *Clark* v. *Campbell,* 514 F. Supp. 1300 (W.D. Ark. 1981). But the court acknowledged (App., *infra,* 7a) that the Seventh Circuit has held that some personnel decisions are judicial acts entitled to absolute immunity. See *Forrester* v. *White,* 792 F.2d 647 (7th Cir. 1986), cert. granted, No. 86-761 (Feb. 23, 1987).

REASONS FOR GRANTING THE PETITION

This case presents a question almost identical to that presented in *Forrester* v. *White*, cert. granted, No. 86-761 (Feb. 23, 1987), which is calendared for oral argument on November 2, 1987. In *Forrester*, the Court will decide whether the Court of Appeals for the Seventh Circuit erred in holding that a judge is absolutely immune from damages in an action by a court-appointed and supervised parole officer challenging her allegedly unconstitutional dismissal. This Court's decision in *Forrester* will, therefore, bear on, if not control, the resolution of the question presented here: As the court below acknowledged (App., *infra*, 7a), the decision in this case—denying petitioner absolute immunity from damages in an action by his personal and confidential secretary—conflicts with the Seventh Circuit's decision in *Forrester*. Accordingly, to ensure that Judge Brody is not deprived of any protection to which this Court may determine that judges are entitled (under the absolute immunity doctrine), we request that the Court hold this petition pending its decision in *Forrester* and then dispose of the petition as is appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Forrester* v. *White*, No. 86-761, and then disposed of as is appropriate in light of that decision.

Respectfully submitted.

CHARLES FRIED
Solicitor General

OCTOBER 1987

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85-1716

HELEN JEAN GUERCIO, PLAINTIFF-APPELLANT

v.

HONORABLE GEORGE BRODY, JUDGE, UNITED STATES BANKRUPTCY COURT, AND THE HONORABLE JOHN FEIKENS, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SUED INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES, DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Decided and Filed April 1, 1987

Before: Lively, Chief Judge; Keith and Merritt, Circuit Judges.

MERRITT, Circuit Judge. This case requires us to draw a line between the administrative and the judicial acts of federal judges. The sole question we address on appeal is whether the doctrine of absolute judicial immunity shields federal judges from any liability for wrongful employment practices.

The District Court dismissed the case on the basis of absolute judicial immunity. In light of our interpretation of the well-settled law that the doctrine of absolute immunity does not extend to the non-judicial acts of judges, we hold that judicial immunity does not apply to the personnel decisions at issue here. We therefore reverse and remand the case to the District Court.

I.

Helen Guercio, the former personal and confidential secretary to Bankruptcy Judge Brody of the Eastern District of Michigan, brought a civil action against Judge Brody and Judge Feikens, Chief Judge of the U.S. District Court for the Eastern District of Michigan, in their individual and official capacities for alleged wrongful termination of her employment. Plaintiff seeks compensatory and punitive damages against both judges in their individual capacities for allegedly discharging her in violation of her First Amendment free speech rights. In addition, plaintiff seeks reinstatement to her former position or a comparable one with back pay and other employment benefits allegedly due.

Defendants moved to dismiss or for summary judgment, and the District Court dismissed plaintiff's amended complaint on the ground that plaintiff's claims are barred by the doctrine of absolute judicial immunity.

The facts of this case, as alleged in the complaint and affidavits of record, lead us through an unfortunate chapter in the history of the U.S. Bankruptcy Court for the Eastern District of Michigan—a period in which Ms. Guercio asserts that she played a central role in exposing corruption in the Bankruptcy Court.

According to the allegations, Guercio was hired in January 1979 by Judge Brody to serve as his secretary. From October 1979 through June 1981, Guercio made various disclosures concerning corruption in the Bankruptcy Court. She revealed, for example, that the Bankruptcy Court's system of random case assignments was being manipulated. These disclosures eventually led to the resignation of a bankruptcy judge as well as the criminal convictions of an attorney and bankruptcy court clerk.

As part of this chain of events resulting from her disclosures, Guercio alleges that the Judicial Council of

the Sixth Circuit intervened and placed the Bankruptcy Court in virtual receivership. The Judicial Council stated in an order dated May 6, 1981:

> The Council concludes that the effective and expeditious administration of the business of the courts within this circuit requires that the administration of the Bankruptcy Court for the Eastern District of Michigan be placed under the supervision of the United States District Court for the Eastern District of Michigan. Such supervision should include the oversight of the general operation of the Bankruptcy Court Clerk's Office, the appointment of an Acting Clerk of the Bankruptcy Court and the approval of all personnel actions affecting employees of the Bankruptcy Court.

By an order of May 18, 1981, the judges of the U.S. District Court for the Eastern District of Michigan directed Chief Judge Feikens to assume supervisory responsibility for the Bankruptcy Court pursuant to the earlier order of the Judicial Council of the Sixth Circuit.

During the summer of 1981, Guercio circulated articles to the press and others from many years before concerning a lawyer who had recently been nominated to fill the vacancy on the Bankruptcy Court. The articles supposedly disclosed that the nominee had earlier been nominated for the position of U.S. Attorney in 1969 but had withdrawn when it was disclosed that he had represented reputed organized crime figures.

With the approval of Chief Judge Feikens, Judge Brody fired Guercio on October 16, 1981.

II.

The central issue in this case is whether Judges Brody and Feikens were carrying out a judicial act in firing Guercio. The Supreme Court in *Stump v. Sparkman,* 435 U.S.

349 (1978), set forth a two-pronged test for determining whether an act by a judge is a "judicial" one. The first element relates to the "nature of the act itself, *i.e.*, whether it is a function normally performed by a judge." 435 U.S. at 362. The second element concerns the "expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Id.*

Applying the *Stump* test, we believe that the actions of Judges Feikens and Brody clearly fall outside a protected judicial act. We follow generally the reasoning of the Seventh Circuit's recent decision in *McMillan v. Svetanoff,* 793 F.2d 149 (7th Cir.), *cert. denied,* 107 S.Ct. 574 (1986), which addressed this issue in the context of a state judge firing a court reporter. In that case the court stated in pertinent part:

> Hiring and firing of employees is typically an administrative task. It involves decisions of a personal rather than impartial nature, which is integral to judicial decisionmaking. The decision to fire the plaintiff did not involve judicial discretion; in other words, the judge did not utilize his education, training, and experience in the law to decide whether or not to retain plaintiff. The administrative act of firing the plaintiff will not assist the judge in interpreting the law or exercising judicial discretion in the resolution of disputes. Certainly the court reporter assists the judge in his or her judicial capacity, *but so does everyone else employed within the judge's chambers*— the secretary, bailiff, law clerk, court reporter, probation officer, clerk of court, janitor—*they all assist in the smooth operation of the judicial process.*

793 F.2d at 155 (emphasis added).

See also Forrester v. White, 792 F.2d at 647, 663 (7th Cir. 1986) (Posner, J., dissenting) ("Judges have both judicial and executive functions. Hiring and firing subordinates are executive functions.")

The crucial mistake in the position adopted by the District Court and argued by defendants is that it conflates official acts of judges into judicial acts and seeks to extend judicial immunity to this broader class of official acts. For the purpose of absolute immunity analysis, this distinction is critical: only judicial acts are cloaked with absolute immunity. *See Stump,* 435 U.S. 349 (1978). Judges may perform many official acts which are not judicial acts. *See, e.g., Supreme Court of Virginia v. Consumers Union,* 446 U.S. 719 (1980) (in promulgating bar code state Supreme Court acted in legislative capacity and not entitled to judicial immunity).

The Supreme Court recognized this fundamental distinction over a century ago in *Ex Parte Virginia,* 100 U.S. 339 (1879). This case involved a county judge indicted for racial discrimination in directing the selection of a jury venire for the county's courts. The judge argued that he could not be prosecuted by performing the judicial act of selecting the venire. The Court rejected the judge's argument in language in harmony with our present case:

> *Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent.* Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors, or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act. . . . It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-

criers, tipstaves, sheriffs, & c. Is their election or their appointment a judicial act?

100 U.S. at 348 (emphasis added).

In this case the District Court committed the same kind of error that the Supreme Court describes in *Ex Parte Virginia*. It confused an administrative or ministerial action with a judicial act. The District Court reasoned that although "the actions of Judge Feikens and Judge Brody were not actions that were taken in the courtroom under the normal advocacy proceedings. . . we believe that the actions of the Judges, whether correct or not, were done within their capacities as Judge of the United States District Court and Judge of the United States Bankruptcy Court for this district." Joint Appendix at 38.

The government argues that Judges Brody and Feikens were performing judicial acts in firing Guercio. It is argued on Judge Feikens' behalf that since Judge Feikens was acting pursuant to an order of the Judicial Council of the Sixth Circuit in approving the firing of Guercio, "Judge Feikens was performing an act by virtue of his judicial capacity." Brief for Appellees at 19. It is also contended that "Judge Brody approached Chief Judge Feikens with the expectation that the latter, as court-ordered receiver of the Bankruptcy court, would review this matter." *Id.* Defendant argues that in the case of Judge Feikens the conjunction of these two factors satisfies the test under *Stump*.

With respect to Judge Brody, defendants highlight various facts as the basis of immunity:(1) Guercio was hired by Judge Brody pursuant to 28 U.S.C. § 156(a) (1982) which gives a bankruptcy court judge the authority to employ a secretary; (2) as Judge Brody's confidential secretary, Guercio acted as Judge Brody's "alter ego"; and (3) Judge Brody "severed this confidential relationship with Ms. Guercio in order to improve both his and the

Bankruptcy Court's ability to function more effectively and harmoniously." Brief for Appellees at 18-19.

Under these arguments, we see no principled limit to defendants' request for immunity. Under the standard urged by defendants, the doctrine of judicial immunity would sweep far too broadly to cover with absolute immunity the actions of the judicial councils of the federal courts of appeals—despite the fact that those councils plainly have authority over the "nonjudicial activities of the courts of appeals." 28 U.S.C. § 332(e)(1) (1982). Moreover, the doctrine as argued by defendants would also cover hiring and firing decisions of federal judges even though these are administrative decisions.

Other courts, in addition to the Seventh Circuit in *McMillan v. Svetanoff,* 793 F.2d 149 (7th Cir.), *cert. denied,* 107 S.Ct. 574 (1986), have agreed that decisions by judges in the personnel context are not judicial acts. *See, e.g., Richardson v. Koshiba,* 693 F.2d 911, 914 (9th Cir. 1982) (screening decisions by judicial selection panel comprised of judges involve "executive" acts); *Lewis v. Blackburn,* 555 F. Supp. 713, 723 (W.D.N.C. 1983) (judge's appointment of magistrates ministerial act), *rev'd on other grounds,* 759 F.2d 1171 (4th Cir.), *cert. denied,* 106 S.Ct. 228 (1985); *Goodwin v. Circuit Court,* 729 F.2d 541, 549 (8th Cir. 1984) (county judge's decision to transfer hearing officer not "official judicial act" but rather "administrative personnel decision"); *Clark v. Campbell,* 514 F.Supp. 1300, 1302 (W.D.Ark. 1981) (county judge, in hiring or firing county employees, exercises administrative and ministerial, not judicial, function). *But see Forrester v. White,* 792 F.2d 647 (7th Cir. 1986) (state judge's alleged wrongful discharge of probation officer entitled to absolute immunity).

This Court has been reluctant to extend the doctrine of judicial immunity to contexts in which judicial decision-making is not directly involved. In *Lynch v. Johnson,* 420

F.2d 818 (6th Cir. 1970), a member of a county "fiscal court" sued a county judge, who was serving *ex officio* as the presiding officer, for forcibly removing him from a meeting and jailing him. The Court concluded that the "fiscal court" was not an "ordinary judicial tribunal" and instead could best be characterized as a body through which the "affairs of the county are managed" with powers that are "legislative and administrative" in nature. 420 F.2d at 820. In light of the functions of the "fiscal court," the Court held that the defendant judge was not performing a judicial act during the meeting at issue and was therefore not entitled to the defense of judicial immunity.

In *King v. Love,* 766 F.2d 962 (6th Cir.), *cert. denied,* 106 S.Ct. 351 (1985), an individual who was mistakenly charged with driving while intoxicated brought a civil action against a city court judge after he was jailed for contempt, and then allegedly through the judge's actions, arrested again. The complaint alleged, first, unlawful incarceration by the judge, and, second, illegal arrest by the judge and police officers. The Court held that the incarceration claim was barred by judicial immunity. The Court explained, "Since the Memphis City Court had subject matter jurisdiction over the driving while intoxicated charge against King and since incarcerating King for contempt of court was a judicial act, King many not sue Judge Love for damages stemming from the March 4, 1980 incident." 766 F.2d at 968. The Court held, however, that the illegal arrest claim was not barred by judicial inmunity since on the facts of the case it was not a judicial act.

The Court stated that "the act of deliberately misleading officers who are to execute a warrant about the identity of the person sought well after the warrant has been issued" is not a judicial act. *Id. See also Sevier v. Turner,* 742 F.2d 262, 272 (6th Cir. 1984) (county juvenile court judge's acts initiating criminal prosecution and civil contempt pro-

ceeding against father in arrears on child support payments "nonjudicial acts" and judge therefore not immune).

We conclude that a proper application of the *Stump* test requires that the firing of Guercio be deemed a nonjudicial act. The firing of a confidential and personal secretary is hardly the "type of act normally performed *only* by judges." *Stump*, 435 U.S. at 362 (emphasis added). Members of the judicial, legislative, and executive branches routinely engage in the task of hiring and firing confidential personnel. This is an administrative act common to all branches of government and the private sector, not "the type of act normally performed only by judges." Furthermore, the expectations of the parties in this case are that personnel/administrative matters are involved, not judicial acts.

The basic problem with defendants' standard extending immunity to Judges Brody and Feikens for firing Guercio is that it would not serve a central underlying purpose of judicial immunity: promoting fearless and independent decisionmaking by the judiciary. This rationale for judicial immunity was firmly established at the common law.[1] An early seventeenth century opinion

> laid down [the principle] that the judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the king himself, and it was observed that if they were required to answer otherwise, it would "tend to the scandal and subversion of all justice, and those who are the most sincere, would not be free from continual calumniations."

Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347-48 (1872) (quoting *Floyd v. Barker*, 77 Eng. Rep. 1305 (1607)).

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[1] For an extensive discussion of the common law origins of the doctrine, *see Pulliam v. Allen*, 466 U.S. 522 (1984).

An 1868 opinion by one of the judges of the Court of Exchequer succinctly stated the purpose of judicial immunity:

> "It is essential in all courts that the *judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear.* This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences."

Bradley v. Fisher, 80 U.S. (13 Wall.) at 350 n. (quoting *Scott v. Stansfield*, 3 L.R. Ex. 220 (1868) (emphasis added)).

The Supreme Court, which established the doctrine of judicial immunity in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872),[2] has repeatedly underlined its importance as a safeguard for judicial decisionmaking.[3] In *Pierson v. Ray*,

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[2] The Supreme Court in *Bradley* held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 80 U.S. (13 Wall.) at 351.

[3] *See, e.g., Butz v. Economou*, 438 U.S. 478, 512 (1978) ("Absolute inmunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation."); *Dennis v. Sparks*, 449 U.S. 24, 31 (1980) (judicial immunity arose to permit judges to decide cases "without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption"); and *Ferri v. Ackerman*, 444 U.S. 193, 203-04 (1979) (immunity helps "forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion").

386 U.S. 547, 554 (1967), which held that the doctrine retained its force in Section 1983 suits, the Supreme Court stated:

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. *Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.* (emphasis added.)

This case does not implicate this central underlying purpose of the doctrine of judicial immunity. The integrity and independence of judicial decisionmaking is in no way impaired if judges are called to account for their personal decisions. Liability for wrongful personnel decisions would not have a chilling effect on the judicial decisionmaking process. Although a judge may exercise discretion and judgment in firing a secretary, it is not the kind of discretion directly connected to independent decisionmaking in the adjudication process which is a paramount concern of the judicial immunity doctrine.[4]

By limiting the application of the doctrine of absolute judicial inmunity [*sic*] in this case, we are giving effect to the principle affirmed by the Supreme Court in *Butz v. Economou*, 438 U.S. 478, 506 (1978):

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:

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[4] For a useful discussion of the underpinnings of the doctrine and citations of related cases, see Note, *What Constitutes A Judicial Act for Purposes of Judicial Immunity?*, 53 Fordham L. Rev. 1503 (1985).

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it."

(citing *United States v. Lee,* 106 U.S. 196, 220 (1882)).

Conclusion

Accordingly, we reverse the judgment of the District Court based on the doctrine of absolute judicial immunity and remand the case for further proceedings. We intimate no view regarding the First Amendment balancing issue calling for consideration of *Pickering v. Board of Education,* 391 U.S. 563 (1968), and *Connick v. Myers,* 561 U.S. 138 (1982), or the doctrine of qualified immunity because those issues were not addressed by the District Court and the record is not now adequate to address them on appeal.

APPENDIX B

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 84-CV-4736 DT

HELEN GUERCIO, PLAINTIFF

v.

GEORGE BRODY AND JOHN FEIKENS, DEFENDANTS

[FILED Aug. 28, 1985]

JUDGE'S DECISION ON MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Proceedings held in the above-entitled matter, before the HONORABLE JULIAN ABELE COOK, JR., U.S. District Judge, at 237 U.S. Courthouse and Federal Building, Detroit, Michigan, on Wednesday, July 10, 1985.

APPEARANCES:

CONSTATINE NICHOLAS REVELOS, ESQ.
MARYA C. YOUNG, ESQ.

Appearing on behalf of Plaintiff.

KEITH FISCHLER, ESQ.
Assistant United States Attorney

Appearing on behalf of Defendants.

* * *

DENISE A. MOSBY, CSR-RPR
Federal Official Court Reporter

Detroit, Michigan
Wednesday, July 10, 1985
Afternoon session

— — —

THE COURT: Thank you.

On October 15, 1984, the Plaintiff Helen Jean Guercio filed a complaint for damages and injunctive and declaratory relief with this Court against Defendants George Brody and John Feikens.

On January 2, 1985 this Court, having reviewed the Plaintiff's complaint, sua sponte dismissed the complaint to the extent, quote, that it makes allegations against Brody's and Feiken's judicial acts, end of quote.

Pursuant to a directive from the Court, the Plaintiff filed an Amended Complaint against the Defendants, in which she set forth a claim against the Defendants in their official and personal capacities.

The Plaintiff Helen Jean Guercio was, prior to the commencement of the original Complaint, a secretary to the Defendant George Brody, who was and is a Judge of the Bankruptcy Court within this district. At some point in time her responsibilities as the secretary to Judge Brody were terminated because, she alleges, Judge Brody had cited her conduct in criticizing a then prospective member of the Bankruptcy Court. The Plaintiff contends that she was fired from her job in contravention of her 5th Amendment right not to be deprived of any property interests which she acquired by virtue of her employment. She also claims that the termination of her responsibilities as Judge Brody's secretary constituted a deprivation of her 1st Amendment rights.

The plaintiff has also made a claim against the Defendant John Feikens, who, at all times that are relevant to these proceedings, was the Chief Judge of the United States District Court for the Eastern District of Michigan and served at times that preceded the commencement of this litigation as the receiver of the Bankruptcy Court.

Subsequent to the filing of the Amended Complaint, the Defendants filed a Motion to Dismiss Complaint or, in the Alternative, for Summary Judgment, citing Federal Rules of Civil Procedure 12(b)(6) and 56, respectively.

The Defendants claim that, one, they are entitled to absolute judicial immunity; two, that if absolute immunity is not appropriate, then they are entitled to be protected by a qualified immunity; and, third, that the Plaintiff has failed to state a cause of action. In so doing, the Defendants argue, one, that her 5th Amendment claim is without merit because she has no property right in her employment. The Defendants also argue that the Plaintiff has failed to establish or to allege that she has sustained any actual injury to her reputation, contending that nothing that was allegedly made public has demonstrated that she was damaged in any way.

The Defendants also argue that when applying the so-called PICKERING test, which originates from the case of PICKERING V. BOARD OF EDUCATION, 391 U.S. 563, that the balancing test limits the 1st Amendment rights of public employees. The Defendants assert that under the PICKERING test, that the balancing test would flow toward them; and, thus, there is no basis for her claim under PICKERING.

The Plaintiff, in response, takes issue with each of the positions which have been advanced by the Defendants and contends that none of the arguments which have been presented to the Court by the Defendants have merit. More specifically, the Plaintiff argues that neither Judge Brody nor Judge Feikens is entitled to an absolute judicial

immunity. The Plaintiff argues that the absolute judicial immunity doctrine is limited only to those acts which are of a judicial nature. The Plaintiff contends that this immunity applies only to legal decisions, since those decisions, if erroneous, can be corrected on appeal.

The Plaintiff also contends that the Defendants are in error when they contend that they are entitled to qualified immunity. The Plaintiff contends that there remain many genuine issues of material fact which, under the standards of summary judgment, should defeat their motion for dismissal and/or for summary judgment.

The Plaintiff has also attacked the PICKERING test and indicates that to adopt the standard which the Government has advanced to this Court would give to any judicial officer the right to summarily dismiss an employee.

And, finally, the Plaintiff argues that there are, as noted earlier, that there are many genuine issues which should be presented to a trier of fact for resolution.

The Court has examined the briefs which have been filed by the parties in this case. The Court has examined all of the positions which have been advanced by the parties in support of and in opposition to the positions which have been presented.

For the reasons which will be noted by the Court, the Court believes that the Government's motion for dismissal on the basis of absolute immunity should be granted. The Court believes that the remaining issues—namely, qualified immunity and failure to set forth a claim—need not be addressed in view of the ruling of the Court.

The Court believes that the case of STUMP v. SPARKMAN, 435 U.S. 349, a 1978 case which holds that absolute immunity for judges is applicable to all actions in which the Judge—that the Judge assumes. We believe that an examination of the applicable case law—and, parenthetically, there are no cases which have been pre-

sented to the Court which are truly applicable here, because the factual situation in the instant cause is different from any of the cases which have been cited – this Court believes that the interpretation of the judicial responsibilities which has been presented to the Court by the Plaintiff is far too narrow.

In the case of Judge Feikens, who had the responsibility of serving as the Chief Judge of the United States District Court, as well as the receiver for the Bankruptcy Court, there were responsibilities that he was required to and empowered to undertake in those capacities. To place a judicial officer in the position which has been advanced by the Plaintiff would, in the judgment of this Court, run contra to the spirit as well as the language of the cases which touch upon the issue of absolute judicial immunity.

While the Court recognizes that the actions of Judge Feikens and Judge Brody were not actions that were taken in the courtroom under the normal advocacy proceedings, that we believe that the actions of the Judges, whether correct or not, were done within their capacity as Judge of the United States District Court and Judge of the United States Bankruptcy Court for this district. We believe that the doctrine of absolue immunity is applicable here; and, thus, the Court will grant, as noted earlier, the request for dismissal by the Government.

As noted earlier, the issues which have been addressed by the parties on the other issues need not be advanced. The Court believes that, notwithstanding the argument of the Plaintiff that an adoption of the absolute immunity doctrine would not eliminate the case, this Court differs and believes that under the ruling of this Court, it represents a final order that the Motion to Dismiss is granted.

I would ask Mr. Fischler to prepare a proposed order and to submit it to Ms. Young for her examination and present it to this Court.

MS. YOUNG: Thank you, Your Honor.

THE COURT: Thank you.

Ms. Young, would you also place a formal appearance within the record within a week's time.

MS. YOUNG: Yes.

THE COURT: Thank you.

(Proceedings adjourned at 4:43 p.m.)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-1716

HELEN GUERCIO, PLAINTIFF-APPEALLANT

v.

GEORGE BRODY AND JOHN FEIKENS,
DEFENDANTS-APPELLEES

[FILED July 17, 1985]

ORDER

Before: Lively, Chief Judge, Keith and Merritt, Circuit Judges

The court having received from appellee George Brody a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-1716

HELEN GUERCIO, PLAINTIFF-APPELLANT

v.

GEORGE BRODY AND JOHN FEIKENS,
DEFENDANTS-APPELLEES

[FILED July 17, 1987]

ORDER

Before: Lively, Chief Judge, Engel, Keith, Merritt, Kennedy, Martin, Jones, Krupansky, Wellford, Milburn, Guy, Nelson, Ryan, Boggs and Norriss, Circuit Judges

A majority of the judges of this court in regular active service have voted for rehearing en banc of this appeal as to appellee John Feikens only. Pursuant to Sixth Circuit Rule 14, it is hereby ORDERED that the previous opinion and judgment of this court as to appellee John Feikens only is hereby vacated, the mandate as to that part of the judgment is stayed, and that part of the case is restored to the active docket as a pending appeal.

The clerk will direct the parties to file supplemental briefs as to John Feikens only and will schedule this case for oral argument as soon as practicable.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Civil Action No. 84-CV-4736 DT

HELEN GUERCIO, PLAINTIFF

v.

GEORGE BRODY AND JOHN FEIKENS, DEFENDANTS

The Honorable Julian Cook, Jr.

ORDER

Upon consideration of defendants' motion to dismiss or, in the alternative for summary judgment, and plaintiff's opposition to this motion and this Court being fully advised in the premises, it is hereby

ORDERED that for the reasons stated on the record defendants' motion should be and, hereby, is granted, and it is further

ORDERED that the amended complaint is dismissed.

JULIAN ABELE COOK, JR.
United States District Judge

Dated: 6 AUG 1985

A TRUE COPY
BY /s/ HOWARD J. MARCZAK
Deputy Clerk

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